KUALA LUMPUR FINANCE BERHAD

v.

KGV & ASSOCIATES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATUK SHAIK DAUD BIN HAJI MOHD ISMAIL J
[CIVIL SUIT NO: D1-22-756-91]
10 MAY 1994

PRACTICE & PROCEDURE*: Application to strike out action summarily - Whether action statute-barred - Action based on fraud and negligence - Cause of action - Whether arose upon discovery of fraud or negligence - Whether Court to act summarily after allowing application to amend pleadings - Order 18 r. 19 RHC 1980.*

The defendant, a firm of property valuers, submitted to the plaintiff a valuation report of a certain property in which they stated that the property had on it a double storey house with a value of RM260,000. Relying on the report, on 14 December 1984, the plaintiff granted a loan of RM150,000 to a third party, the borrower. This loan was never repaid from the very beginning. On 6 March 1989, the plaintiff discovered that there was no double storey house on the said property and that the property's value was only RM53,000. The plaintiff alleged fraud and negligence by the defendant, and on 31 May 1992, they filed a suit against the latter claiming as special damages the aforesaid loan amount.

The plaintiff had not stated in their statement of claim the date when they discovered the alleged fraud and negligence, and thus sought leave to accordingly amend the statement. The defendant however applied to strike out the plaintiff's action under O. 18 r. 19 RHC. The defendant contended that the cause of action herein arose on 14 December 1984 when the borrower defaulted and hence the plaintiff's action, being filed only in May 1992, was time-barred.

Held:

[1] The plaintiff's claim has nothing to do with the default by the borrower. The plaintiff is not claiming for the repayment of the loan it gave to the borrower but are claiming as special damages the amount they lost as a result of the defendant's negligence or fraud. Therefore the date the cause of action arose ought not to be the date the borrower defaulted but the date the plaintiff discovered the negligence or fraud, which was 6 March 1989. The plaintiff's action therefore is not statute-barred.

[2] On the facts this is not a clear cut case for the Court to exercise its discretion under O. 18 r. 19 of the RHC. It is also settled law that leave to amend pleadings ought to be given where such amendment, as exemplified by the present case, can correct a defect in the pleadings. When such leave is given, the general rule is that the Courts would not act summarily.

[Application dismissed]

Cases referred to:

Bandar Builders & Ors. v. United Malayan Banking Berhad [1993] 2 SCR 628 ***(refd)***
Pirelli General Cable Works Ltd. v. Oscar Fabor & Partners [1983] 2AC 1 ***(dist)***

Legislation referred to:

Limitation Act, 1953, s. 6(1) (a)
Rules of the High Court, 1980, O. 18 r. 19

For the plaintiff - Leong Mun Yin; M/s Yusuf Lee Pathma & Marbeck
For the defendant - Tunku Farik Ismail; M/s Azim Ong & Krishnan

JUDGMENT

Shaik Daud Bin Hj. Mohd Ismail J:

The plaintiff is a licensed finance company and the defendant is carrying on the business of property valuation. Prior to 18 October 1984 one Ah Loy trading as Nyet Yoon Enterprise (the borrower) applied for a loan from the plaintiff and as security intended to charge a piece of property situated at Lot 2506 Mukim Semenyih, Hulu Langat Selangor. The borrower employed defendant to make a valuation of the said property.

Consequently the defendant submitted a valuation report dated 18 October 1984 and in that report *inter alia* stated:-

(a) there was a double storey house of less than 4 years erected on the said property; and

(b) they valued the said property at a fair market value of RM260,000 and a forced sale value of RM220,000.

The plaintiff relying on the valuation report granted a loan of RM150,000 to the borrower on security of charge of the said property. Plaintiff claims that in truth and in fact the statement contained in the valuation report was misleading and/or false and untrue in that there was no house at all erected on the said property and that the fair market or forced sale value of the said property was not as stated by the defendant. In consequence the plaintiff claims that they had suffered loss as the loan was never repaid from the very beginning. Therefore plaintiff filed this suit against the defendant claiming as special damages the loan amount of RM150,000 with interest ranging from 15% to 17% per annum. They also claimed general damages.

The defendant entered appearance and filed their statement of defence denying the plaintiff's claim and alleging negligence on the part of the plaintiff. The defendant then filed this application by summons in chambers for an order that the plaintiff's claim be struck off under all the four limbs of O. 18 r. 19 Rules of the High Court 1980.

Now it is trite law that this rule enforces the rule of pleadings and empowers the Court in a summary manner, without holding a trial, to order stay or to dismiss an action or enter judgement accordingly where the pleadings discloses no reasonable cause of action or defence or is scandalous, frivolous or vexatious or it prejudices embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the Court. There are no derth of authorities on the principle upon which the Court ought to act in exercising its power under any of the four limbs of this rule. There is no doubt that the power to dismiss an action summarily without a trial is indeed a drastic power. There fore only in plain and obvious cases that recourse be had to this summary procedure under the rule.

The Supreme Court recently in dismissing a similar application expressed the same sentiments, where the Court in *Bandar Builders & Ors. v. United Malayan Banking Berhad* [1993] 2 SCR 628 said at page 635:-

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19 Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule per *Lindley M R in Hubbuck v. Wilkinson* [1899] 1 QB 86, page 91, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the fact of it "obviously unsustainable". *Att -Gen of Dutchy of Lancaster v. L & N W Ry Co.* [1992] 3 CL 271 CA. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence.

It is also settled law that the mere fact that the case is weak and unlikely to succeed is no ground for striking out and also where the pleadings can be amended, leave under the rule to amend will almost always be given. In other words if there are defects in the pleadings resulting in the other party applying to strike out, and if an amendment can correct defect, the Courts generally would not act summarily.

Having set out the relevant law I have now to see if the plaintiff's claim necessitate me to allow the defendant's application to strike out the plaintiff's claim summarily. Firstly it must be mentioned that the plaintiff had in fact filed a summons in chambers which is also before me today seeking to amend their statement of claim.

Tunku Farik Ismail for the defendant submits that since the plaintiff's claim is based on negligence and fraud the claim is time barred as sit was filed over six years after the cause of action had arisen. He contends that the cause of action arose on 14 December 1984 but the suit was filed on 31 May 1992 which is well over six years. He pointed to the plaintiff's statement of claim where it is stated that since the disbursement of the loan on 14 December 1984 the borrower made no repayment whatsoever, therefore there had been a default since the very beginning and since plaintiff said that they suffered damages from the very beginning cause of action must therefore arose on 14 December 1984. Therefore the plaintiff's claim is statute barred by virtue of s. 6(1) (a) of the Limitation Act 1953. He contends that the basic rule is that the cause of action accrues when damage is suffered, and that the cause of action is complete when there is a plaintiff who can sue and a defendant who can be sued.

The question, therefore, here is when did the cause of action arose? Learned Counsel for the defendant reckons that the cause of action arose on 14 December 1984 when the plaintiff disbursed the loan to the borrower and when the borrower failed to repay. The learned Counsel for the plaintiff on the other hand contends that this being a claim for negligence and fraud, not against the borrower the fact that the borrower defaulted from the beginning is immaterial. The negligence and fraud here is not by the borrower but by the defendant as valuer. The fact that the borrower defaulted is another issue altogether for which the plaintiff is also entitled to sue the borrower. The borrowers failure to repay the loan is another and a separate loss altogether. Therefore the cause of action should not be from the time the borrower defaulted but from the time the plaintiff discovered the negligence and/or fraud of the defendant. With this contention I agree. The plaintiff's claim herein has nothing to do with the default by the borrower. Which default has no connection with the plaintiff's alleged negligence and or fraud. The plaintiff here is not claiming for the repayment of the loan it gave to the borrower but they are claiming as special damages the amount they lost as a result of the defendant's negligence and or fraud. Therefore I agree that the date the cause of action arose here ought not to be the date the borrower defaulted but ought to be the date the plaintiff discovered the negligence and or fraud. Learned counsel for plaintiff submits further that it is this date of discovery that the plaintiff inadvertently omitted to put in their pleading for which they have now applied to amend their statement of claim which application is also before me. It is also settled that where a pleading is capable of being amended so as to correct any defect, leave to amend should be given rather than to strike it out. Learned counsel for the plaintiff submits that while the defendant may have been guilty of negligence and or fraud on 18 October 1984 but plaintiff only discovered the negligence and or fraud on 6 March 1989 when the plaintiff called for another valuation report from another firm of valuers which report showed that the defendant's report is totally false. The latter report showed that at the material time there was no house on the said land and the sale value was only RM53,000 Therefore in my view based on the circumstances of this

case, the date the cause of action arose ought to be 6 March 1989 and that being so the plaintiff's claim is not statute barred.

Learned Counsel for the defendant in countering this argument submits that if the Court accepts the date the cause of action arose not being the date the borrower defaulted then he contends that the date ought to be the date when the negligence and or fraud occurred and not when the plaintiff discovered it, which in turn means that we are now back to the 1984 date. For this proposition he relied on the case of *Pirelli General Cable Works Ltd. v. Oscar Fabor & Partners* [1983] 2AC 1 where the House of Lords held that the date of accrual of a cause of action in tort for damage caused by negligence design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered. With respect I do not think that that finding can be applied in the present case as the circumstances are different. In that case the House of Lords was considering on damage caused by the negligent design or construction but in the present case it is not one based on negligent design or construction. In the present case the damage caused by the alleged negligence and or fraud of the defendant occurred only when the plaintiff received the latter valuation report.

For the above reasons I hold plaintiff's claim is not statute barred and since the defendant's application is based solely on this ground their application must fail and accordingly I hold that this is not such a clear cut case for me to exercise my discretion under O. 18 r. 19 and in the premises the defendant's application is dismissed and costs to defendant.